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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-722

THE SCHOOL BOARD OF ORANGE COUNTY, FLORIDA,
Petitioner,

v.

EVELYN R. ELLIS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EVELYN R. ELLIS, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order and judgment entered on August 17, 1972, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered August 17, 1972, is set forth in the Appendix, p. 1a. The opinion of that Court is not yet reported. The

decisions of the United States District Court for the Middle District of Florida entered on July 22, 1971, on August 16, 1971, and on September 17, 1971, are set forth in the Appendix, pp. 4a, 11a, 25a. These decisions are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on August 17, 1972. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether schools constructed in 1964 and 1966 as a result of a legal stipulation entered into by the parties in a school desegregation action constitutes discriminatory action by school authorities.

2. Whether in a school desegregation action a school board has an obligation under traditional concepts of equity jurisprudence to correct in 1972 the effects of a legal stipulation filed in 1964.

3. Whether a finding of the District Court that further desegregation of one school is not feasible under the circumstances then existing can be reversed by the Court of Appeals in the absence of any stated reasons for reversal.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

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STATEMENT OF THE CASE

1. Proceedings in the District Court

In May of 1971, the respondents, following this Court's decision of *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971), filed a motion for further relief before the District Court. (The Orange County school system previously had been adjudged unitary and fully desegregated in February of 1970. *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 5 Cir. 1970, 423 F. 2d 203.) The respondents' motion prayed that the District Court restructure the student body compositions of eleven schools attended predominantly or solely by black students, alleging that the racial composition of the schools was a "continuing effect of past and present discriminatory action" by *petitioner*. (emphasis supplied)

The District Court conducted hearings to determine if the racial composition of the eleven schools constituted a "vestige" of a state-imposed dual school system. The District Court ruled that four of the schools (Hungerford, Maxey, Orange Center, and Richmond Heights) were not vestiges of past discriminatory action since these schools were constructed after respondents in 1964 entered into a joint stipulation receding with prejudice from any objections to the construction of these schools. (This litigation was begun in 1962.) The District Court further found that desegregation of one school (Eccleston) was not "feasible" in that a wide band of schools surrounding this school had mixed student bodies making it impracticable to achieve further mixing. The District Court ordered petitioner to prepare and implement a desegregation plan for the remaining six schools. Peti-

tioner appealed the District Court's order while respondents filed a cross appeal.

2. The Decision of the Court of Appeals

Approximately one year after the entry of the final order by the District Court, the Court of Appeals entered its order and opinion.

The Court of Appeals held that two of the four schools (Hungerford and Maxey) constructed after the stipulation were desegregated. The Court ruled that two of these schools (Orange Center and Richmond Heights) together with Eccleston, must be desegregated further. The Court of Appeals gave no specific reasons for overturning the findings of the District Court as to the non-discriminatory origin of the schools built by stipulation. Likewise the Court of Appeals set forth no reasons for overturning the District Court's finding that numerical desegregation of Eccleston was not feasible.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed in that it is in conflict with and erroneously applies the decision of this Court of *Swann* v. *Charlotte Mecklenburg Board of Education,* 402 U.S. 1 (1971). This Court is the proper forum to decide and clarify the important questions of Constitutional law presented.

1. There is no Constitutional violation requiring the exercise of judicial power unless school authorities create or maintain racially segregated schools.

This Court has been presented with virtually every nuance and variation of governmental policy to sep-

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arate pupils solely on the basis of race. Each time this Court has exposed school authorities to rigid Constitutional scrutiny and has never failed to strike down inherently unequal treatment of pupils based upon racial considerations even when these considerations are masked behind legal arguments. However, this Court has never been called upon to decide the issue of whether a school system must be held responsible for the actions of the attorneys for the plaintiffs approving the construction of schools.

The issue presented by this petition transcends what may appear to be the final legal grumblings of a school board enmeshed in desegregation litigation since 1962. The goal expressed by this Court in *Swann, supra,* at page 32 that neither school authorities nor district courts "are constitutionally required to make year by year adjustments of the racial composition of student bodies" becomes an unrealized dream if school authorities are required to correct the results of actions and agreements undertaken by their adversaries in litigation. Whatever changes may occur in schools which are included in current desegregation plans, school authorities can never effectively counter a future charge that they contributed to and are responsible for the educational success or failure of these schools, unless they can be assured that present legal proceedings participated in and approved by the litigants will not be held to be unconstitutional. Therefore, this petition does not present the narrow issue of the fate of three schools, but rather presents the broad issue of whether there are limits to the Constitutional duties of school authorities in the area of school desegregation when, as in this cause, the action of school authorities was non-discriminatory on its face since it was ap-

proved by all parties. One does not need to indulge in soothsaying to conclude that today's desegregation plan will be the catalyst of tomorrow's litigation. The forces urging compensatory education lie waiting to strike down desegregation plans approved or consented to by the representatives for the present class actions.

This Court should grant a writ of certiorari to clarify whether a legal stipulation relied upon by the petitioner is merely an historical anomaly affecting Orange County alone or whether all pleadings approved by the litigants are non-discriminatory and thus legally binding.

2. Remedial action taken by District Courts in desegregation actions is governed by traditional equitable concepts. This petition seeks to test whether these equitable considerations referred to in *Brown* v. *Board of Education* (Brown II), 1955, 349 U.S. 294, and emphasized in *Swann, supra,* govern the actions of the parties as well as those of the District Courts.

The logical positive postulated by the Court of Appeals that the involved schools constructed following the joint stipulation were part of the dual school system which existed prior to that Court's decision of 1970 which ruled Orange County to be unitary is superficially appealing, but constitutionally incorrect. Petitioner has set forth above that the present racial composition of a school constructed with the legal approval of the adverse litigants in desegregation litigation can in no sense be the "result of present or past discriminatory action on their (school authorities') part". *Swann, supra,* p. 26. Another and a deeper issue involving fundamental fairness is raised in this petition, an issue of "substance not semantics", *Swann, supra,* p. 31.

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In 1964, Orange County approved additional taxes to fund a bond issue of twenty-five million dollars, which funds were to be used to build or improve schools. Orange Center and Richmond Heights schools were listed in the bond election as proposed new schools. On May 13, 1964, the attorneys for the petitioner and for the respondents filed a joint stipulation in which respondents receded with prejudice from their motion for preliminary injunction which sought to enjoin the spending of the bond proceeds. The stipulation waived any and all rights to appeal. Attached to the stipulation was a desegregation plan which required the re-location of two proposed schools, one of which was Orange Center. There is no factual dispute that respondents clearly and unequivocally raised the issue of school location and later clearly and unequivocally approved the location and construction of Orange Center and Richmond Heights. As this Court has stated in *Swann*, p. 16: "As in any equity case, the nature of the violation determines the scope of the remedy". The petitioner did not violate any Constitutional or equitable duty in constructing these schools. The respondents were at the time they raised the issue of school construction in litigation with petitioner and were in the strongest legal position since the spending of the funds for needed school construction was necessary to insure adequate educational opportunity. The respondents were not in doubt as to the Constitutional rights they were asserting. In addition, they were in a favored position to gain redress of these asserted rights.

Petitioner urges that the past actions of respondents be governed by traditional equitable concepts including the doctrines of clean hands and estoppel. This

issue likewise transcends the particular circumstances present in Orange County since the conduct of both parties in Constitutional litigation must be governed by prescribed standards if the litigation is to come to an end.

3. The power of a District Court to fashion a desegregation remedy is broad and virtually unlimited. The District Court must, however, exercise its remedial discretionary powers in a manner which is "reasonable", "feasible" and "workable". *Swann*, p. 31. The reviewing function of the Court of Appeals is to determine whether the District Court corrected, "by a balancing of the individual and collective interests the condition that offends the Constitution." *Swann*, p. 16. As to one-race schools, the remedy of the District Court may allow certain schools to remain "all or largely of one race until new schools can be provided or neighborhood patterns change". *Swann*, p. 25.

The District Court found that desegregation of Eccleston was not feasible:

> "A wide belt of schools to the north, east and south of Eccleston school contains schools which are already integrated with considerable numbers of black students, so that pairing or clustering of Eccleston with any of such schools would accomplish little in the way of desegregation. The pairing of Eccleston with a school beyond such a belt would require cross busing of the youngest school children (grades one through six) which this Court finds is not feasible." (App. p. 34a)

The District Court concluded that with the effective use of the mandatory majority to minority transfer policy and the expected growth requiring a new school Eccleston could remain without alteration:

> "Plaintiffs' counsel takes the position that Eccleston and Washington Shores cannot remain with

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the present racial compositions. This Court notes that in *Charlotte Mecklenburg* the Supreme Court specifically commended the use of the majority to minority transfer as first promulgated in this litigation (and the Supreme Court referred to this case by name). If it had been the intention of *Charlotte Mecklenburg* to require the immediate termination of all black or substantially all black schools (with which that portion of the opinion dealt) it would have been completely unnecessary to recommend the use of the majority to minority transfers. This Court construes *Charlotte Mecklenburg* as contemplating under certain conditions the existence of all black or nearly all black schools and that in such cases the majority to minority transfer right can be used by those desiring transfers.

As the expected growth of population—both white and black—develops west and southwest of Eccleston, a new look should then be taken at the possibility of invoking a feasible plan to alter the racial composition of that school and any site selected for a new elementary school in the growth area should be made with that as an objective." (App. p. 36a)

The Court of Appeals' treatment of the District Court's findings is deficient. The Court of Appeals ruled that Eccleston was part of the dual school system, a fact which was found by the District Court and which is acknowledged by the petitioner. Rather than addressing itself to the correctness of the remedy proposed by the District Court, the Court of Appeals ruled that Eccleston "be desegregated". For a number of years it has been accepted practice of the Court of Appeals for the Fifth Circuit to over-rule orders of the District Courts which are constitutionally deficient. To the knowledge of petitioner these appellate reviews have never been undertaken without a showing by the

Court of Appeals as to why or in what manner the District Court's action was erroneous.

The conduct of the Court of Appeals is so great a departure from the proper course of appellate proceedings that this Court should exercise its power of supervision.

CONCLUSION

For the reasons set forth above, it is respectfully urged by petitioner that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2696

EVELYN R. ELLIS, ET AL., *Plaintiffs-Appellees,*

v.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, *Defendant-Appellant.*

Appeal from the United States District Court for the Middle District of Florida

(August 17, 1972)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: We are now presented with further appeals arising out of the efforts to desegregate the Orange County School system. The appeal was filed by the School Board and the plaintiffs have filed a cross-appeal.

The School Board strenuously objects to the district court's having granted further relief to the plaintiffs following the decision of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554. The School Board contends that the system was finally and conclusively desegregated beginning with the 1970-71 school term in accordance with our mandate in *Ellis* v. *Board of Public Instruction of Orange County, Fla.,* 5 Cir., 1970, 423 F.2d 203. In an ordinary lawsuit we would agree. School desegregation law, however, is unlike ordinary law in that the confines of what is necessary to desegregate a school system were never settled until the *Swann* decision, if then, and thus formerly segregated school districts must comply with that as a supervening decision of the Supreme Court on the

subject. We affirm the orders of the district court granting further relief to plaintiffs.

In our prior decision, 423 F.2d at 205, supra, we noted that the Orange County School district was almost the size of Rhode Island (1,049 square miles). For the 1970-71 school term, there were 98 separate schools housing 82,868 students—82 per cent white and 18 per cent black. The enrollment increased to 86,705 by the 1971-72 school term. There were 15,747 black children in the system.

All that remains of the more than a decade of litigation over desegregation of the system is now presented to us in the cross-appeal of plaintiffs. First, plaintiffs urge that five elementary schools have not yet been desegregated. Second, they resist the closing of two schools having black student bodies, or alternatively, if closed, they contend that the protective elements of our decision in *Singleton* v. *Jackson Municipal Separate School District*, 5 Cir., 1970, 419 F.2d 1211, respecting faculty and staff, must be ordered by the district court.

The five schools in question are Eccleston, Orange Center, Maxey, Richmond Heights and Hungerford. We hold that Maxey and Hungerford are already desegregated and that no further relief is required as to them. Maxey, as of October 26, 1971, had a student body comprised of 360 black students and 95 white students. On the same day there were 270 black students and 70 white students at Hungerford. It is to be noted that black students are in the majority in these schools but the majority to minority transfer provision of *Swann*, 402 U.S. at 26-7, citing *Ellis* v. *Orange County*, 423 F.2d at 206, may be utilized by those black students in these schools who seek a majority white student body. The majority to minority transfer option with free transportation has been widely used in Orange County where it is fostered by a bi-racial committee. In the 1970-71 school term, it was utilized by 2,095 black stu-

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dents out of the total of 14,856 black students in the system at the time.

Student bodies at Eccleston, Orange Center and Richmond Heights on October 26 were comprised as follows:

School	*Black Students*	*White Students*
Eccleston	1,249	2
Orange Center	717	29
Richmond Heights	744	0

These schools have never been desegregated and were a part of the dual school system which existed prior to our 1970 decision, supra. We hold that plaintiffs are entitled to an order requiring that these three schools be desegregated. See *Cisneros* v. *Corpus Christi Independent School District*, 5 Cir., 1972, — F.2d — [No. 71-2397, slip opinion dated August 2, 1972], for the remedy to be applied in the desegregation process as to the three schools in question.

The next issue has to do with the order of the district court permitting the closing of the Holden Street and Webster Avenue Elementary Schools. The findings were that these schools were closed for the reason that they were located in heavy traffic areas which had lately become highly commercialized and the School Board wished to sell the land on which the schools were located because of its increase in value. There was no indication whatever of the schools being closed for racial reasons. We conclude that the findings of fact of the district court in support of the decision to allow the closing of these schools were amply supported and not clearly erroneous. See *Lee* v. *Macon County Board of Education*, 5 Cir., 1971, 448 F.2d 746; and *Mims* v. *Duval County School Board*, 5 Cir., 1971, 447 F.2d 1330, for a discussion of the propriety and impropriety of closing formerly black schools.

Lastly, plaintiffs complain that the district court erred in connection with the closing of the schools, in decreeing

a standard less than that enunciated by this court in *Singleton* v. *Jackson Municipal Separate School District,* supra, to protect the faculty and staff of these schools. These claimed deficiencies are difficult to perceive inasmuch as the district court ordered, as a condition to closing Holden and Webster Schools, that the School Board provide any "displaced principal, staff member, or faculty member . . . with a comparable position." However, out of an abundance of caution, we direct the district court to require that the School Board comply with the provisions of *Singleton* v. *Jackson* with respect to the faculty and staff at these schools, as indeed all of the provisions of *Singleton* are to be complied with as to the entire school system.

AFFIRMED as to the appeal; AFFIRMED in part and reversed in part on the cross-appeal; REMANDED for further proceedings not inconsistent herewith.

Let the mandate issue forthwith.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 1215-ORL-CIV.

EVELYN R. ELLIS, ET AL, *Plaintiffs,*

v.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, *Defendant.*

Order

The plaintiffs have filed another "Motion for Further Relief" which was set down for hearing and arguments heard.

A brief review of the more recent history of this case is in order. On February 17, 1970, the Court of Appeals in

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Ellis v. *Board of Public Instruction of Orange County, Florida,* 423 F. 2d 203 (5th Cir.) restated the six elements necessary for effecting a unitary nonracial school system.[1]

That Court then held, p. 204:

> "... we conclude that the Orange County school system falls short of being a unitary system only in one respect: A part of the student desegregation plan."

The Court then proceeded to approve a neighborhood assignment system based on assigning students nearest the student's home up to the capacity of the given school coupled with a majority to minority transfer right with guaranteed priority as to space and free transportation.

The Court proceeded to then find, p. 208:

> "There are a number of all-white student body schools in the Orange County system. This is due to the preponderant white population (82 percent), and to residential patterns. The three all-Negro student body schools which will remain, if the neighborhood assignment system is properly invoked, are also the result of residential patterns. The majority to minority transfer provision under the leadership of the biracial committee is a tool to alleviate these conditions now. Site location, also under the guidance of the biracial committee, will guarantee elimination in the future. In addition, open housing, Title VIII Civil Rights Act of 1968, 42 U.S.C.A., § 3601, et seq, *Jones* v. *Mayer,* 1968, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189, will serve to prevent neighborhood entrapment."

The Court then proceeded in Appendix II of its opinion to list the anticipated racial composition of the then all-

[1] Composition of student bodies, faculty, staff, transportation, extracurricular activities, and facilities.

Negro schools once the assignment plan required by that Court was effectuated. The assignment plan as directed by the Court of Appeals was implemented by the school board for the 1970-71 school year with results—as later herein specifically set forth—which closely approximated the expectations of the Fifth Circuit.

The February 17, 1970 Fifth Circuit ruling was not appealed; nor was there an appeal of this Court's order of March 24, 1970 finding that a unitary school system would exist upon implementation of the Fifth Circuit's directions in the February 17, 1970 opinion. The assignment system as contemplated was implemented and now plaintiffs challenge not the implementation but the plan itself as insufficient under the recent Supreme Court cases of Swan v. Charlotte Mecklenburg Board of Education, — U.S. —, 28 L. Ed. 2d 554, 91 S. Ct. —, and Davis v. Board of School Commissioners of Mobile County, — U.S. —, 28 L. Ed. 2d 577, 91 S. Ct. —.

Specifically plaintiffs object to the present racial composition of Jones Senior High School, Carver Junior High School and the following elementary schools: Holden Street, Hungerford, Maxey, Orange Center, Richmond Heights, Washington Shores, Webster Avenue, Wheatley and Eccleston.

The racial composition of each of the schools in February 1970, the anticipated composition for the 1970-71 school year by the present plan in effect, the September 1970 actual composition and the May 1971 actual composition for each of the challenged schools follows:

School		Feb. 1970	Anticipated	Sept. 1970	May 1971
Jones Sr.	Black	1136	(not con-	813	803
High School	White	121	sidered)	183	146
Carver Jr.	Black	1143	1100	1035	1085
High School	White	1	47	81	59

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School		Feb. 1970	Anticipated	Sept. 1970	May 1971
Holden Street	Black	717	725	882	765
	White	1	0	10	8
Hungerford	Black	448	353	303	292
	White	0	141	56	48
Maxey	Black	468	461	390	469
	White	1	38	60	67
Orange Center	Black	716	655	655	629
	White	0	50	22	34
Richmond Heights	Black	703	692	782	798
	White	0	22	0	0
Washington Shores	Black	797	783	727	731
	White	0	0	0	3
Webster Avenue	Black	410	352	262	265
	White	3	76	38	29
Wheatley	Black	824	811	898	980
	White	0	29	140	195
Eccleston	Black	904	889	1044	1191
	White	0	0	0	3

In the "Motion for Further Relief" it is contended by plaintiffs:

> "Pupils of all grades should be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."

To accomplish the foregoing objective the plaintiffs have proposed a plan for pairing or clustering thirty schools (3 senior high schools, 3 junior high schools and 24 elementary schools). The schools involved would all then have student bodies with blacks in the minority—ranging from 32 to 45 percent. There would then be no all-black

schools but there would still be 24 all-white or nearly all-white schools.

In *Charlotte-Mecklenburg* the Court said in reference to schools all or largely of the minority race:

> " . . . In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.
>
> In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No per se can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The Court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the Court that their racial composi-

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tion is not the result of present or past discriminatory action on their part."

The foregoing Supreme Court opinion in effect, requires two results in desegregation efforts—first, the abolition of any state-imposed segregation in the school system—students, staff, facilities, transportation, faculties and extra-curricular activities; and second, the elimination of all the vestiges of past segregation.

In the Orange County school system segregation is dead and its corpse long-since buried; however, the question remains whether certain schools have all-black or nearly all-black student bodies because of *past* state-imposed school segregation. If so, then the school board must present a plan to change the racial composition of such schools. *Swann* v. *Charlotte-Mecklenburg, supra.* On the other hand, if the racial composition of such schools is not the result of present or past discriminatory action on the part of the school authorities, then *Swann* v. *Charlotte-Mecklenburg* does not compel racial redistribution.

The school board has taken the position that its school system is a unitary one and that the motion for further relief should be denied. However, *Swann* v. *Charlotte-Mecklenburg* requires the further findings by this Court as above noted.

Therefore this case is set for further hearing at 10:00 o'clock A.M., August 3, 1971, before this Court for the school authorities to present either evidence sufficient to carry their burden that the racial composition of the following listed schools (which in May 1971 had student bodies which were 90% or more black) is not the result of past discriminatory action on their part or a plan for changing the racial composition of such schools as to which they cannot carry such burden. As already indicated, the composition is not the result of any present discrimination

so the issue involved relates solely to whether the racial composition is the result of past school discrimination. The schools involved are:

Carver Junior High School
Eccleston Elementary
Holden Street Elementary
Orange Center Elementary
Richmond Heights Elementary
Washington Shores Elementary
Webster Elemeatary

The defendants and their counsel have access to the facts from which they should be able to decide if they are required to present a plan under the existing law without the necessity of court order. If a plan is required it should be presented on August 3rd and be sufficient to accomplish full compliance with Brown I,[2] as amplified by *Swann* v. *Charlotte-Mecklenburg* and related cases. Hopefully this litigation might then terminate. Chief Justice Burger recognized such a possibility in these school cases when in *Swann* he stated:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is elimi-

[2] Brown v. Board of Education, 347 U.S. 483 (1954).

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nated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary. . . ."

IT IS SO ORDERED this 22nd day of July, 1971.

/s/ GEORGE C. YOUNG
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 1215-ORL-CIV.

EVELYN R. ELLIS, ET AL., *Plaintiffs*,

v.

THE BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA, *Defendant*.

Order

This suit was initiated on April 6, 1962—almost nine and a half years ago—but still is before this Court. Its lengthy life is not due to prolonged active litigation or to inattention by this Court. The reason it still lingers on is because it has been revived from time to time by plaintiffs' counsel because of new developments in the law as determined by judicial decisions.

On May 28, 1964 a "Plan of Desegregation" was filed by defendant school board; on June 9, 1964 counsel for plaintiffs and counsel for defendant filed a joint stipulation

agreeing that the plan filed May 28, 1964 complied with the prayers of the amended complaint and on June 9, 1964 a "Final Decree" was entered directing compliance with the May 28th plan. The record does not reflect any non-compliance with that plan.

The next development in the case—as reflected by the file—with the filing of a joint motion by counsel for both sides seeking an order of this Court requiring compliance with an Amended Plan of Desegregation as attached to the motion and which amended plan counsel agreed would comply with the requirements of *United States* v. *Jefferson County Board of Education, et al,* 380 F. 2d 385 (5th Cir. 1967).

On April 25, 1967 another "Final Decree" was entered by this Court directing implementation of the amended plan.

Then on December 2, 1968 a "Motion for Further Relief" was filed alleging the plan in effect had not succeeded in dismantling the dual school system. No charge was made that defendant had not complied with the plan in effect; rather, the charge was against the plan itself. On February 18, 1969, after a prior hearing, this Court directed the defendant to present a further plan of desegregation in compliance with the then applicable decisions of the United States Supreme Court and the Fifth Circuit Court of Appeals.

On February 26, 1969 counsel for both sides filed a "Joint Motion" seeking another order of this Court requiring board compliance with the then existing plan as amended by the amendments attached to the said "Joint Motion". The proposed amendments—known as Plan "B" —called for the closing of Jones, Drew, and Wheatley Junior and Senior High Schools, and Callahan, Webster, Avalon and Douglass Elementary Schools at the close of the 1968-69 school year. Two days later—February 28, 1969—counsel for plaintiffs withdrew their consent to the

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"Joint Motion"; on March 5, 1969 defendant's counsel withdrew his consent.[1]

On March 11, 1969 an additional "Proposed Plan of Desegregation"—Plan "C"—was filed by the defendant board. Plaintiffs' counsel objected to the plan, thereby requiring the first hearing of contested issues as to a plan in this law suit. As this Court then noted.[2]

> "Except for the objections of persons not parties to this proceeding, Plan "B" might have been adopted and the record of unlitigated desegregation have remained intact."

On May 13, 1969 this Court entered its 24 page order analyzing and approving Plan "C". Appeal by plaintiffs' counsel followed. Thereafter, during the pendancy of the appeal, the Supreme Court decided *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 24 L. Ed. 2d 19 (1969) and the Fifth Circuit decided *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1970). This case was remanded on December 12, 1969 with an opinion which stated in part, 421 F. 2d 134 (5th Cir. 1970) at page 135:

> "The Orange County School Board has made substantial progress in the course of recent years toward converting its dual school system into a unitary system. The current status must be reviewed, however, in the light of decisions of the Supreme Court and of this court which have been tendered since the order of the district court which forms the subject matter of this appeal . . . ."

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[1] As noted in this Court's order of May 13, 1969, the consent withdrawals followed a community protest, including a boycott by Jones' students, to the announcement of closing Jones High School.

[2] Order of May 13, 1969.

> "... To the end that the district court may now review the Orange County School desegregation plan and require that it comport in all respects with these more recent decisions, we vacate and remand to the district court."

On January 15, 1970 defendant board filed its "Notification of Compliance" advising that teachers and staff would be assigned prior to February 1, 1970 so as to fully comply with *Singleton*, supra. Such compliance was fully and timely accomplished. Also on January 15, 1970 the board filed two pupil desegregation plans identified as Plan I and Plan II. By order of January 22, 1970 this Court approved Plan I and rejected Plan II. Appeal followed and after submission of additional findings the Fifth Circuit on February 17, 1970 affirmed in part and reversed in part, requiring certain modifications to Plan I so as to effectuate a unitary school system. Those modifications were made and on March 24, 1970 this Court entered its order finding such implementation would accomplish a unitary school system. No appeal therefrom was taken and the board has operated through the 1970-71 school year under a plan which both this Court and the Fifth Circuit had found to be a unitary one.

Subsequently—on April 28, 1971—the Supreme Court decided the cases of *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971). A "Motion for Further Relief" was thereafter filed by counsel for plaintiffs, hearings held on August 3, 4, and 12, 1971 at which evidence was adduced and arguments heard.

Plaintiffs' counsel by their "Motion for Further Relief" object to the present racial composition (or—to be more exact—as it was at the end of the 1970-71 school year) of each of the following:

> Jones Senior High School, Carver Junior High School and Eccleston, Holden Street, Hungerford, Maxey,

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Orange Center, Richmond Heights, Washington Shores, Webster Avenue and Wheatley elementary schools.

The racial composition of each of the schools in February 1970, the anticipated composition for the 1970-71 school year by the present plan in effect, the September 1970 actual composition and the May 1971 actual composition for each of the challenged schools follows:

School		Feb. 1970	Anticipated	Sept. 1970	May 1971
Jones Sr. High School	Black	1136	(not considered)	813	803
	White	121		183	146
Carver Jr. High School	Black	1143	1100	1035	1085
	White	1	47	81	59
Eccleston	Black	904	889	1044	1191
	White	0	0	0	3
Holden Street	Black	717	725	882	765
	White	1	0	10	8
Hungerford	Black	448	353	303	292
	White	0	141	56	48
Maxey	Black	468	461	390	469
	White	1	38	60	67
Orange Center	Black	716	655	655	629
	White	0	50	22	34
Richmond Heights	Black	703	692	782	798
	White	0	22	0	0
Washington Shores	Black	797	783	727	731
	White	0	0	0	3
Webster Avenue	Black	410	352	262	265
	White	3	76	38	29
Wheatley	Black	824	811	898	980
	White	0	29	140	195

In the most recent motion, counsel for plaintiffs contend:

> "Pupils of all grades should be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."

To accomplish the foregoing objective the plaintiffs have proposed a plan for pairing or clustering thirty schools (3 senior high schools, 3 junior high schools and 24 elementary schools). The schools involved would all then have student bodies with blacks in the minority—ranging from 32 to 45 percent. There would then be no all-black schools but there would still be 24 all-white or nearly all-white schools.

The total student population and the racial break-down as to each public school in Orange County as of May 21, 1971 is shown in Appendix "A". There were 26 secondary schools and 66 elementary schools; a total of 83,996 students—68,766 white, 15,230 Negro.

This Court does not construe *Charlotte-Mecklenburg* as requiring racial ratios but only that ratios could voluntarily be utilized by a school board or could be made compulsory by a Court only as a tool to effectuate desegregation. The history and the accomplishments of desegregation in Orange County do not require compulsory racial ratios. However, the *Charlotte-Mecklenburg* and *Davis* cases require—because of the holdings in each—further review of specific schools which remained all or almost all Negro in student enrollment. Supreme Court decisions under the federal Constitution stand as the paramount law of the land superseding all conflicting prior decisions of this and all other courts inferior to it.

Evidence was received as to whether the present racial composition of each of the challenged schools was the result of past racial discriminatory action on the part of the defendant board. The issue was limited to past action and

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excluded consideration of present discriminatory action because the record is clear that the pupil assignment plan now in effect in Orange County does not exclude any pupil of a racial minority from any school directly or indirectly on account of race. To the contrary, a student of a minority race can attend the school to which he is assigned without reference to race or may, if he so elects, transfer under the majority to minority rule with the guarantee of space in the school of transfer and have free transportation provided where required.[3]

But the review as to whether any racial imbalance stems from past board-imposed segregation is required by the language of *Charlotte-Mecklenburg* where the Court said, pages 25 and 26:

> ". . . In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.
>
> In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure

[3] This option granted by Orange County was recognized with approval by the Supreme Court in *Charlotte-Mecklenburg*, page 27.

a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The Court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the Court that their racial composition is not the result of present or past discriminatory action on their part."

So this Court has construed the foregoing language to mean that desegregation efforts require two results—first, the abolition of any board-imposed segregation in the school system (students, staff, facilities, transportation, faculties and extracurricular activities); and second, the elimination of all vestiges of past segregation.

To carry the interpretation of *Charlotte-Mecklenburg* still further; if a present racial imbalance is a result of past de jure segregation, then steps are required under the aforesaid Supreme Court ruling to correct such imbalance. On the other hand, if a present imbalance is the result of de facto segregation, then such imbalance is not under present law a constitutional violation requiring remedial action.

Orange County is an area of rapid population growth—many of its people have moved here or been born here long after *Brown I*[4] and have not known or experienced school assignments by race. In the 1960-61 school year there were 53,912 students in the public schools of Orange County, of which 45,015 were white and 8,897 were Negro. As previously noted, by the end of the 1970-71 school year the

[4] *Brown v. Board of Education*, 347 U.S. 483 (1954).

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total student enrollment in the county had grown to 83,996 of which approximately 82% were white and 18% were Negro.

The Negro families have been expanding into a previously undeveloped area lying generally south and west and southwest of Lake Mann and west of Clear Lake. (See attached map of Orlando-Winter Park schools marked Appendix "B".) Much of the development has been of new subdivisions of attractive single family residences.[5] Population growth has also expanded into newly constructed public housing, not only in the areas southwest of Lake Mann and west of Clear Lake, but also in the area east of Lake Mann and north of Clear Lake.

The schools now involved fall into several categories but will be discussed individually in the groups in which they fall.

Eccleston, Holden Street, Webster Avenue and Wheatley

These elementary schools were constructed at different dates but all prior to the termination of the dual assignment system in Orange County.

At the close of the 1970-71 school year Eccleston had 1,191 Negro students and 3 white ones; it is, therefore, essentially a one race school. Constructed originally to serve handicapped Negro students from the whole county, in 1959 it was converted to an elementary school. The pupil assignments are not presently made on a basis of race and the fact the enrollment is almost all Negro results solely from the area it serves being mostly Negroes. The school board is not responsible for this situation but because this school was a part of the dual system under the *Charlotte-Mecklenburg* decision it appears that some fur-

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[5] This Court has personally viewed each of the challenged schools as well as the surrounding neighborhoods.

ther plan should be adopted by the school board to desegregate Eccleston.

Holden Street, built in 1950, served Negro children only and in May 1971 had 765 Negro students and 8 white ones. Except that this school was always an academic one the findings as to Eccleston are equally applicable to Holden Street. As to this school, also, further desegregation is required.

Webster Avenue, also built in the 1950's, was constructed to serve a Negro community in Winter Park. In May 1971 it had 265 Negro students and 29 white so that approximately 90% of the student body was Negro and 10% white. Again because of the past history of the school in light of *Charlotte-Mecklenburg*, some additional desegregation should be undertaken.

In Apopka, a city in the northwest section of Orange County, all 7th and 8th grades attend Apopka Junior High School which in May 1971 had 955 students—339 Negro and 616 white. All 9th, 10th, 11th and 12th grades attended Apopka Memorial High School with an enrollment of 1,338—431 Negro and 907 white. In addition to Wheatley there are two other elementary schools—Dream Lake and Lovell. Dream Lake in May 1971 had 41 Negro students and 779 white ones; Lovell had 3 Negro pupils and 921 white ones.

Wheatley opened in 1951 to serve a Negro area of Apopka. Under the neighborhood assignment plan now in effect, in September of 1970 there were 140 white students out of a total of 1,038 assigned to Wheatley; by the end of the school year the number of white students had increased to 195 out of a total of 1,175. So the racial ratio in May 1971 was 83.4% Negro and 16.6% white. Although this was previously a school attended only by Negro children, it is obvious that it is presently an integrated school. However, because Wheatley was constructed as a part of the dual assignment system, *Charlotte-Mecklenburg* requires "every effort to achieve the greatest possible degree of actual desegregation". Since Dream Lake, Lovell and Wheatley are

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all within three miles of each other, pairing of two or clustering of the three is a feasible solution. Further, this can be accomplished with minimal additional transportation because over 1,000 students are already provided busing to these schools (627 of the 924 Lovell students were bused in 1970-71). Obviously, not all students attending paired or clustered schools will require transportation.

So the defendant board should provide further desegregation plans for Wheatley.

Hungerford, Maxey, Orange Center and Richmond Heights

During the pendancy of this litigation there was a bond issue approved by the freeholders of Orange County on November 5, 1963 for the purpose of financing school construction. On May 5, 1964 plaintiffs' counsel filed in this case a motion to enjoin the defendant from letting bids for the construction of a number of schools which included the facilities now constituting Hungerford, Maxey, Orange Center and Richmond Heights elementary schools. Plaintiffs contended the schools would be built at sites to perpetuate segregation.

On May 13, 1964 plaintiffs' counsel and counsel for the defendant filed a joint stipulation wherein it was agreed that the Court should enter an order denying with prejudice plaintiffs' motion for an injunction, preliminary or permanent. In the stipulation the plaintiffs specifically receded from the affirmative relief sought in the Motion for Preliminary Injunction.

Thereafter, pursuant to consultations with representatives of plaintiffs and under the provisions of the desegregation plan then in effect which inter alia, provided:

> "Construction of new school facilities and additional school facilities shall be commenced in accordance with sound administrative policies in such a manner that the race or color of the pupils attending the schools

will not be one of the criteria in any determination of new school facilities or the expansion of existing school facilities."

The four schools—and others—were constructed and put into operation at differing dates after 1964.

Each of these facilities was built after the dual assignment policy was abolished by Orange County; each was built after the objections of record in this case by counsel for plaintiffs had been withdrawn and there is no evidence they were built with any intent to perpetuate segregation.

Further, as to Richmond Heights and Maxey, they were built on the edge of undeveloped lands which could later be occupied by either race. To the west of Maxey a subdivision occupied by whites has been built—accounting for some of the 67 whites in Maxey. Around Richmond Heights there has been a spread of attractive neighborhoods of single-family homes bought by Negroes.

Orange Center was built in an area of numerous apartments and public housing units; Hungerford was built in the town of Eatonville, a separate municipality of Orange County occupied solely by Negroes.

Each of these four schools is a fine, modern facility and this Court is satisfied that they were built on their present sites for reasons other than to perpetuate segregation, so their racial compositions are not vestiges of past segregation. Under those circumstances the defendant has no obligation to take further desegregation steps as to those schools. Of course, if defendant so desired, it would offer little difficulty for it voluntarily to cluster Maxey with Winter Garden and Dillard Street elementaries as those two are already paired and are all only a relatively few blocks from each other.

Washington Shores

This elementary school built before the end of the dual assignment system comes within the category of Eccleston,

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Holden Street, Webster and Wheatley except for the problems obviously inherent in effecting further desegregation steps. This Court notes that the H.E.W. approved Plan II of 1970 would have left Washington Shores an all Negro school. But that was before *Charlotte-Mecklenburg*. As to this school, therefore, the defendant should present further desegregation procedures or satisfactorily demonstrate the impracticality of any such further actions pertaining to Washington Shores.

Carver Junior High School

Carver Junior High School is a new, modern air conditioned facility which in September 1970 had an enrollment of 1,035 Negro students and 81 white students; at the end of the 1970-71 school year in May the enrollment was 1,085 Negro and 59 white pupils.

Beyond Carver to the west and to the south are new residences occupied by Negro families, so that because of this new housing the composition of Carver is primarily Negro. This school opened in 1964 with just classroom facilities and then in 1966 the auxiliary facilities were completed as a result of being financed by the 1963 bond issue in an amount of $663,000.00. Because this school was initially constructed prior to the institution of the first desegregation plan in this case, it comes within the category of those schools requiring "every effort to achieve the greatest possible degree of actual desegregation." *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33 p. 37 (1971).

Some further plan, therefore, should be forthcoming from the board to accomplish as to Carver the objective required by the said Supreme Court opinion, taking into account the practicalities of the situation.

Jones High School

Jones Senior High School in February of 1970 had 1,136 Negro students and 121 white students; after the institu-

tion of the neighborhood zone plan for the 1970-71 school year in September of 1970, there were 813 Negro students enrolled and 183 white students, and in May of 1971, the figures had changed somewhat to 803 Negro students and 146 white students. The neighborhood zone resulted in an assignment of 619 white students and 899 Negro students to Jones Senior High School; however, as noted above, only 183 white students enrolled in September of 1970 and this number had dropped to 146 in May of 1971. The school board determined that the reasons for the non-attendance of the 440 whites assigned to Jones were that approximately 225 transferred to private schools, 115 attended Mid Florida Tech for a completely vocational program instead of an academic curriculum and approximately 100 moved or dropped out of school entirely.

In considering the racial composition of Jones High School and whether the school board has fulfilled its obligation to desegregate it, this Court should consider the numbers of whites and Negroes assigned to the school which for the past school year were approximately 40% white and 60% Negro. That percentage in the opinion of this Court is sufficient to not only constitute integration but desegregation as well. The school board cannot be defaulted for the fact that some of the white students failed to attend where the school board was not responsible for such non-attendance.

The board is directed to file plans in accordance with the directions herein by August 23, 1971, and plaintiffs shall have until August 25, 1971 to file objections, if any, thereto. If objections are filed a hearing is hereby set thereon for 8:30 o'clock A.M., August 27, 1971.

DONE and ORDERED in Chambers at Orlando, Florida, this 16th day of August, 1971.

/s/ GEORGE C. YOUNG
United States District Judge

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 1215-Orl-Civ.

Evelyn R. Ellis, et al., *Plaintiffs*,

v.

The Board of Public Instruction of Orange County, Florida, *Defendant*.

Order

This case is before the Court on a "Motion for Further Relief" filed by counsel for the plaintiffs. Initial hearings were held on August 3, 4 and 12, 1971, for the purpose of determining whether the plaintiffs were entitled to further relief. By order of August 16, 1971, this Court found that the plaintiffs were entitled to a portion of the relief sought and by said order the defendant school board was directed to file a plan in accordance therewith. A plan has been filed by the school board on September 10, 1971 and this Court held a full day of evidentiary hearing on the second business day thereafter—September 14, 1971.

There is now before the Court the issue as to whether such school board plan meets the requirements of the law as enunciated by the decisions of the Supreme Court of the United States and the Court of Appeals for the Fifth Circuit. Plaintiffs' counsel have also filed a plan and the Congress of Racial Equality (CORE) has sought to intervene and file a plan of its own. In addition the school board has filed a motion to dismiss this proceeding which has been pending now since August 16, 1962.

It is unnecessary to restate in this order the history of this litigation because it was summarized in the order of August 16, 1971. The task of this Court is to comply with

the rulings of the Supreme Court of the United States (particularly those set forth most recently in *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971), in a way which is equitable and gives proper weight to the many conflicting factors involved. This Court recognizes that school systems are created and operated at public expense for the purpose of educating the young and that the rulings pertaining to desegregation are not intended to replace the educational objective of schools, but only to have that objective attained in a non-discriminatory fashion.

Although on January 22, 1971, this Court found the neighborhood school to be the backbone of the educational system, the Supreme Court of the United States subsequently decided *Davis, supra,* in which that Court held, p. 37:

> "Neighborhood school zoning . . . (is not) *per se* adequate to meet the remedial responsibilities of the school board."

The Supreme Court, therefore, while not prohibiting neighborhood schools, did hold that in certain instances a local school board might have to resort to some pupil assignment procedure other than on the basis of a neighborhood school zone.

Charlotte Mecklenburg, supra, required both the elimination of present segregation and the vestiges of any past segregation. In this Court's order of August 16, 1971, as well as in orders prior thereto, this Court found—and reaffirms here—that there is presently no segregation by law involved in the assignment of any students to the public schools of Orange County, but this Court did find that certain schools were constructed in black neighborhoods prior to the end of discriminatory assignments and that such schools constituted vestiges of a prior segregation

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practice which required further remedial action. Counsel for the plaintiffs contended that eleven schools should be further desegregated by the school board; this Court after the August hearings found, for the reasons stated in its order of August 16, that only six of the schools came within the category of "vestiges of prior segregation" and that as to only those schools would further action be required.

Eccleston, Holden Street, Webster Avenue, Wheatley and Washington Shores Elementary Schools and Carver Junior High School were the six schools to which the board was directed to give further desegregation consideration. The board has filed what it has termed its "Education Plan", which, in brief, contemplates the extension of the assignment zone for Wheatley Elementary School so as to include an additional 64 white students; the closing of Holden Street and Webster Avenue Elementary Schools and the reassigning of the students to other schools; the conversion of facilities of Eccleston Elementary and Carver Junior High schools to a special educational complex serving emotionally disturbed and physically handicapped children, and other children requiring specialized education and the assigning of students now attending those schools to a new elementary and a new junior high school and to other neighboring schools, and leaving the assignment of pupils to Washington Shores as at present, but increasing interschool activities of the students with the students of other schools.

Wheatley Elementary

Wheatley Elementary is in an area southwest of Apopka and its enrollment on September 13, 1971 was 914 black students and 164 white students.[1] The proposal of the board is to extend the attendance zone line to the south of Wheatley, so as to include 64 white students who would

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[1] Enrollment figures for all Orange County schools on September 13, 1971 is attached as Appendix A.

otherwise be assigned to Spring Lake Elementary, in the area of Ocoee.

This Court finds that proposal is in accord with constitutional requirements, provided that those students residing south of Highway 424 now being bused to Lovell Elementary School (which lies north of U.S. 441) are included within the Wheatley attendance zone. This Court is informed[2] that approximately 60 white students residing south of Highway 424 are transported by bus to Lovell and it would not in any way increase the busing burden of the school board for the assignment of those students to Wheatley instead of Lovell. Therefore, the eastern attendance zone of Wheatley should be extended east to Highway 424 so as to include those students presently being bused to Lovell Elementary School. Wheatley would then have 914 black and 288 white students.

In this Court's order of August 16, a clustering of Dream Lake, Lovell and Wheatley was suggested as a means of further desegregating Wheatley. The board has instead proposed the extension of the Wheatley attendance zone and if such proposal meets constitutional requirements as interpreted by the Supreme Court, this Court should not substitute its judgment for that of the board. A clustering of the schools would distribute the black students now attending Wheatley among the three schools and result in a majority of white students in each school; however, the amount of busing required would be increased and for some grades, students would be attending schools some distance from their own neighborhoods. The *Charlotte Mecklenburg* decision used the language that a board should utilize "every effort to achieve the greatest possible degree of desegregation". If that language were lifted out of context of that decision, it could have no other meaning than to require a fixed racial ratio in every school because

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[2] From statistics furnished by the school board staff subsequent to the last hearing pursuant to a request from this Court.

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a racial ratio in every school is obviously "the greatest degree of actual desegregation". In Apopka it would require the clustering of the only three elementary schools. However, this Court in its initial interpretation of *Charlotte Mecklenburg,* did not construe that, that case, taken as a whole, required fixed racial ratios and this Court further stated that fixed racial ratios were not required in Orange County. This Court further concludes that the words "greatest possible degree of actual desegregation" mean that desegregation which is practical and feasible pursuant to an equitable remedy, taking into consideration all the conflicting factors. The addition of approximately 124 white students to Wheatley will, in this Court's opinion, constitute sufficient desegregation to meet the requirements of the law.

Holden Street

Holden Street Elementary School is one of the older schools in the county system, having been built in 1950 and is at a site which is rapidly changing from residential to commercial. It is adjacent to U. S. 441, a much traveled divided highway, with tremendous commercial development for miles in each direction. Traffic noises are disturbing and the traffic itself is, of course, a hazard to children attending the school. The site is small and therefore not subject to a large group physical education or playground activities. The new east-west expressway will be passing immediately north of the school and the acquisition of right-of-way has and will cause the relocation of numerous families from the area. Its impact in enrollment reduction has already been felt. The board proposes to close this school and to reassign the students now attending Holden Street to other area schools which will for the most part be within walking distance and not require transportation to those not previously transported. There are presently fourteen relocatable classrooms on the Holden Street site, which the board would plan to move to the

site of the Grand Avenue Elementary School during the 1971 Christmas vacation, so that students and teachers now utilizing those relocatables would be transferred as of January 1, 1972 to Grand Avenue; the remainder of the Holden Street students under the plan would be reassigned for the commencement of the 1972-73 school year to other area schools.

The almost all black student enrollment of Holden Street would be disbursed to Grand Avenue, Rock Lake, Princeton and Orange Center; except for the latter school students would be in schools with either a majority of white students or a substantial percentage of white students. This Court finds, therefore, that the closing of Holden Street is a desirable action for the school board to take for sound educational and business reasons, not connected with race, but that such action would result in substantial desegregation of the students now enrolled at Holden Street, provided that the attendance zones of Hillcrest and Blankner are extended so as to include some of the Holden Street students; such assignments to Hillcrest and Blankner should be used to reduce the large transfers to Grand Avenue and Orange Center schools.

Webster Avenue Elementary

Webster Avenue Elementary, built in the 1950's, is now in a highly commercial area surrounded by 4-lane heavily traveled streets. Directly across the street to the south lies the Winter Park Shopping Mall, one of the largest of its kind in Central Florida. At the end of the block to the west of the school lies Highway 17-92, one of the main highways through Florida, as well as a heavily traveled road for intra-city traffic. Immediately to the east of the school is a heavily traveled 4-lane intra-city road. The board proposes to close this school and to transfer the students presently enrolled there to other schools in

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the area which would result in substantial desegregation of the student body of Webster.

The board has established sufficient grounds for the closing of Webster for sound reasons other than race, so this portion of the board's proposal should be and is accepted. It is noteworthy that none of the black students transferred from Webster will be assigned to a school with a majority of black students.

Eccleston-Carver Complex

To accomplish further desegregation of Eccleston Elementary School and Carver Junior High School, the school board has proposed to convert the campuses of those two schools, which are adjacent to each other, to a special education complex replacing Forrest Park, Gateway and Magnolia Center special schools. Forrest Park is a school operated by the school board for physically handicapped children; Gateway School is also operated by the county school board for emotionally disturbed and perceptionally damaged children; and Magnolia Center operates for the trainable, mentally retarded child. The school board has found that the largest proportion of the children requiring such special attention comes from the southwest segment of Orange County and believes, therefore, that one facility providing all of the services required for handling special students should be congregated on one campus in the southwest portion of the county. The combined campuses of Eccleston and Carver provide a large area in which additional buildings are planned as a special education center and for therapeutic services.

The present facilities of the special schools (Forrest Park, Gateway and Magnolia Center) are inadequate and undesirably located so as to require new facilities, apart from the racial issues involved in this case.

The school board plans to build a new elementary school in an area northwest of the Carver-Eccleston complex and

a new junior high school to be called "Orla Vista Junior High School" in the area west of the Carver-Eccleston complex. Both of these schools would be in the area of Kirkman Road, north of the new Valencia Community College, which has just been completed for occupancy but will continue to have growth for some years. The area west of the Carver-Eccleston complex to Kirkman Road (as will be seen from Appendix B) is primarily undeveloped, as is the area on west of Kirkman Road. It is this area lying just northeast of a large real estate development just underway (Major Realty) and Disneyland (which opens in October of this year) in which it is expected that rapid future population growth will occur with both white and black families. Projected schools in this area are not only desirable but necessary and offer expectation for integrated enrollment.

The school board's plan is to reassign some of the present Carver pupils to the new Orla Vista Junior High School as walk-ins and to transport by bus some of the Carver students to Robinswood and Westridge Junior High School. The board plans to open both the new elementary school and the new Orla Vista Junior High School in September 1972 by the use of temporary relocatable facilities pending the completion of permanent construction.

The board has made a good case for relocating Forrest Park, Gateway and Magnolia Center, but it has not established the need for converting Carver and Eccleston to that use. Those two schools—Carver and Eccleston—are in modern facilities and on desirable sites. Prior to the present controversy other sites have been considered by the board for relocating the special schools and there is ample open space to the west of Eccleston and Carver for such a special school complex, without converting the two existing facilities necessitating the use of portable buildings for replacement schools.

If the board desires to build an additional junior high school and elementary school as proposed, this order is not

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intended to foreclose such action. However, consultation as to the proposed sites should be made with the Bi-racial Advisory Committee and, such schools—if built—should supplement, not replace, Eccleston and Carver.

This Court is required by the order of the Court of Appeals issued September 3, 1971, to direct plans in place of any board plan disapproved by this Court. Therefore, the Court directs that until other schools or population changes—or both—dictate otherwise, the facility at Carver should be utilized by all 7th grade students from Robinswood, Carver and Westridge; Robinswood should handle all 8th and 9th grade students in the Robinswood neighborhood zone plus a portion of the 8th and 9th grade students from Carver; and Westridge should handle all 8th and 9th grade students in its neighborhood zone plus the remainder of the Carver 8th and 9th grade students. The evidence showed that the majority of Westridge students are now being transported to that school by bus and the board's plan calls for transporting some Carver students to Robinswood and to Westridge. Therefore, this change to the board's plan should not substantially increase transportation requirements over those presently in existence and those that were planned by the school board's proposal.

Each day approximately 423 former Robinswood 7th graders and 263 former Westridge 7th graders (a total of about 686) will attend Carver and approximately 780 former Carver 8th and 9th graders will attend Robinswood and Westridge. The effect on desegregation will be substantial as the present racial compositions of the three schools are as follows:

	Black	White
Carver	1,115	54
Robinswood	72	1,196
Westridge	91	699

A wide belt of schools to the north, east and south of the Eccleston school contains elementary schools which are already integrated with considerable numbers of black students, so that pairing or clustering of Eccleston with any of such schools would accomplish little in the way of desegregation. The pairing of Eccleston with a school beyond such a belt would require cross busing of the youngest school children (grades one through six) which this Court finds is not feasible.

Washington Shores Elementary

Washington Shores Elementary School is located in the center of the black community and presents great problems in desegregation. The school board states on page 6 of the plan:

> "The location of this school does not allow for the alteration of the composition of its student body while at the same time preserving the neighborhood school concept."

As previously noted, while the neighborhood school is in the opinion of this Court the most desirable for educational purposes, it is not under the ruling of *Charlotte Mecklenburg* sacrosanct. A determination therefore as to whether any change should be made in the present composition of a school's student body must be determined on a basis other than whether it offends the neighborhood school concept. The same problem as outlined above concerning Eccleston is present as to Washington Shores; it is surrounded by a belt of already racially integrated schools which precludes pairing or clustering with any one or more of them. As with Eccleston, this Court concludes that pairing or clustering with distant schools would be adverse to the interests of the young students involved.

The unanimous opinion in *Charlotte Mecklenburg* appeared to recognize that in formulating a plan involving

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transportation, the age of the students and distance involved was a factor to be considered. In lieu of reassignment of Washington Shores' students, the school board plan calls for increased activities of the Washington Shores' students in various inter-school programs. The proposal is for attendance at a number of social activities, such as the Florida Symphony Orchestra and the Navy graduation exercises which are, of course, desirable programs for the children to attend, but they do not offer the integrated activities represented to be the objecive of the program. The plan further proposes:

> "Inter-school exchange will be planned for students at Washington Shores on a regular basis . . . there will be grade level exchanges between two or more schools according to a schedule. For example, there will be opportunities for inter-school physical competition with sixth graders from nearby schools. In addition, there will be opportunities for students to compare art and musical talents, as well as physical feats."

The acceptance of the board's proposal as to Washington Shores is made with the additional requirement that such a schedule of inter-school exchanges covering all grades of Washington Shores be prepared, a copy filed with the Court, and carried out as planned. The same requirement is made as to Eccleston.

Plaintiffs' counsel takes the position that Eccleston and Washington Shores cannot remain with the present racial compositions. This Court notes that in *Charlotte Mecklenburg* the Supreme Court specifically commended the use of the majority to minority transfer as first promulgated in this litigation (and the Supreme Court referred to this case by name). If it had been the intention of *Charlotte Mecklenburg* to require the immediate termination of all black or substantially all black schools (with which that portion of the opinion dealt) it would have been completely unnec-

essary to recommend the use of the majority to minority transfers. This Court construes *Charlotte Mecklenburg* as contemplating under certain conditions the existence of all black or nearly all black schools and that in such cases the majority to minority transfer right can be used by those desiring transfers.

As the expected growth of population—both white and black—develops west and southwest of Eccleston, a new look should then be taken at the possibility of invoking a feasible plan to alter the racial composition of that school and any site selected for a new elementary school in the growth area should be made with that as an objective.

Plaintiffs' Proposal

Counsel for plaintiffs have filed in writing on September 9, 1971, a proposed plan which corresponds to the oral proposal previously submitted in open court in August and to which this Court alluded on page 8 of its August 16, 1971 order. The proposal calls for the pairing or clustering of thirty schools, requiring extensive cross-busing of approximately an estimated 16,000 students. For the reasons stated in the August 16th order, further action by the school board is not required as to five of the schools so that plaintiffs' plan as to those schools could not be compulsorily directed by this Court. As to the remainder of the schools, except as to Carver Junior High School, the proposals call for action unnecessarily burdensome to all children involved—both black and white. Remedial procedures can under the circumstances—to the extent required—be accomplished by more equitable means.

As to Carver Junior High School, the proposal seeks a clustering of Robinswood, Memorial and Carver, but the proposal is outdated as it contemplates 1,077 white students at Memorial, whereas it now develops the enrollment as of September 13, 1971 at Memorial Junior High School was 626 white students and 514 black ones.

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Although this Court found that Jones Senior High had sufficient desegregation action by the school board to preclude the necessity of further remedial action and therefore, the plaintiffs' plan as to it is superfluous; nevertheless, a word as to plaintiffs' proposal pertaining to that school may be in order. Plaintiffs' proposal seeks to cluster Edgewater, Jones and Boone High Schools with all 12th grade students attending Jones, all 11th grade students attending Edgewater, and all 10th grade students attending Boone. Even if Jones required some further desegregation, such a proposal is so totally inconsistent with the best interests of the involved high school students as to be unacceptable to this Court. Probably at no other time in an average student's life does he or she attain such loyalty and interest in a school as in high school. Extracurricular activities become a vital part of a student's matriculation; plaintiffs' plan would eliminate the continued participation in inter-scholastic activities—such as football—of Jones, Edgewater and Boone, and extinguish each as a separate high school entity.

Plaintiffs also propose an alternative plan as to Jones High School whereby Evans Senior High School would be closed and its students reassigned to various high schools, including Jones. No evidence was presented by plaintiffs that there is any reason to close Evans Senior High School other than for racial purposes.

The proposal of the plaintiffs is found not acceptable and implementation of it will not be ordered.

Motion To Intervene

The Congress of Racial Equality (CORE) on September 14, 1971, filed a motion to intervene and a motion for leave to file a plan amicus curiae and attached thereto a proposed plan. The proposed plan of CORE opposes what it terms the "dispersion concept of integration" and pro-

poses instead a neighborhood community school district with localized control.

This Court has previously, during the course of this litigation, denied intervention to various would-be intervenors. As previously noted, the school board is the primary determiner of the school system's affairs and the only function of a federal court is to determine whether the actions of the school board meet the constitutional requirements as interpreted by the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit. There is no reason shown why that issue cannot be resolved without intervention. While this Court is denying the motion of CORE to intervene and present its plan, it is perhaps of interest to note that the action herein taken by this Court gives recognition to the position that blacks as well as whites are entitled to neighborhood schools where they do not offend desegregation rulings. This principle is particularly applicable to the western portion of the black community in which Eccleston and Carver are located. That area consists of many new or relatively new, single-family residences in well kept attractive neighborhoods justifying pride in ownership and the community.

Option To Utilize Closed Schools

In its proposal to close Webster Avenue and Holden Street Elementary schools, the board has stated it wishes to have an option in the sale of the lands to utilize the buildings. Plaintiffs' counsel has construed this request as a possible intention of the board to continue full use of these buildings. The school board witness, however, indicated that the option was solely for the purpose of permitting the board to utilize the buildings in total or in part when the land was sold, rather than having them bulldozed and removed for salvage by the buyers of the sites.

It seems only good business sense for the board to salvage whatever economic value there may be from the

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buildings when the land is sold and the requested option is approved and is not construed as a reservation on the intentions of the board to close the schools and sell the sites.

Staff and Faculty Assignments

Some question was raised as to the meaning of the board's plan to give "priority" in vacancies to any principals, or teachers or staff displaced by the closings of Webster and Holden. In order to avoid any future controversy on that subject the approval of the plan of the board to close Webster and Holden is subject to the board providing any displaced principal, staff member, or faculty member by the closing of the two schools, with a comparable position.

Regional Advisory Committees

The board's proposal calls for the establishment of regional advisory committees to advise the superintendent of public instruction in certain limited areas and for the Bi-racial Advisory Committee, previously established pursuant to order of the Fifth Circuit Court of Appeals, to be abolished. This Court finds that if the board wishes to create regional advisory committees for the purpose of advising the superintendent on student behavior and conduct, including dress codes; curriculum and educational programs; and school facilities and educational equipment, as set forth in the plan, that it may do so, but that the Bi-racial Advisory Committee may not be abolished nor may its functions be eliminated or diminished by the board without prior approval of this Court, which, at this time is not given.

Substitution of Plaintiffs

Counsel for the plaintiffs sought to substitute different parties as plaintiffs than those originally named in the complaint when first filed. This request should be granted.

Defendant's Motion To Dismiss

The defendant board has filed a motion to dismiss this cause which at this time is not considered, because the motion is premature. However, this Court restates as it has several times in recent orders, that it contemplates that when the issues now involved are finally determined and a reasonable time thereafter has elapsed to assure implementation of the actions required, that then this Court intends to finally dismiss this case.

Date of Implementation

The board's plan calls for transferring a number of Holden Street students to Grand Avenue during the Christmas recess this year and then at the end of the 1971-72 school year, closing Holden and Webster, effecting the assignments as contemplated for Holden, Webster and Wheatley for the beginning of the 1972-73 school year. The Fifth Circuit Court of Appeals on September 3, 1971, issued its order directed to this Court providing among other things, that:

> "... Students and faculty to be transferred under such plan as is approved by Court order will be reassigned at once to carry out the plan."

The words "at once" foreclose approval by this Court of a delay for transfer of students to the beginning of the 1972-73 school year and even foreclose an approval of delaying the transfer of some students from Holden to Grand Avenue until the Christmas vacation this year. The students to be transferred in accordance with the plan as modified or altered herein must be accomplished "at once", which this Court construes to be immediately but with a reasonable time to accomplish such transfers. On balance it would appear that the transfers should be accomplished within two (2) weeks from the date of this order and if any further delay is sought it will have to be presented to the Court of Appeals as this Court construes the September 3,

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1971 directive to it divested it of power to extend the period of transferring students beyond that time; it is therefore,

ORDERED:

1. That the proposed plan of the plaintiffs be and is hereby not approved.

2. That the motions of the Congress of Racial Equality to intervene and to file a plan be and is hereby denied.

3. That the motion of the plaintiffs to substitute Cathi Q. Mitchell, by her father and next friend, James Q. Mitchell, and Shonda Denise Johnson, by her mother and next friend, Constant Y. Brewer, for plaintiffs in this cause for those previously named as plaintiffs, be and is hereby granted.

4. That the motion to dismiss this cause will be held in abeyance for consideration at a later date.

5. That the plan of the defendant board is rejected in part and accepted in part as modified by this Court's directives as contained herein and the board is hereby directed to implement the plan as modified so that all transfers of students and faculty involved in connection with Wheatley, Webster, Holden, Carver, Robinswood and Westridge will be completed for the opening of school on October 4, 1971.

6. Defendant board shall file with the Clerk of this Court semi-annual reports similar to those required in *United States* v. *Hinds County School Board*, 433 F. 2d 611 (5th Cir. 1970).

7. The board is directed to comply with all other provisions of this order although not specifically listed in this ordering paragraph.

DONE and ORDERED in Chambers at Orlando, Florida, this 17th day of September, 1971.

GEORGE C. YOUNG
United States District Judge

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FILED
FEB 10 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-722

THE SCHOOL BOARD OF ORANGE COUNTY, FLORIDA,

Petitioner,

—v.—

EVELYN R. ELLIS, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit is now reported at 465 F.2d 878 (1972).

Questions Presented

1. Whether a school board should be absolved from desegregating for the first time certain all-black or virtually all-black schools in 1973, nineteen years after *Brown* v. *Board of Education* and eleven years after suit was filed by black parents and students seeking an end to the dual,

racially-segregated system administered by that board, based upon a 1964 stipulation agreeing to the construction of such schools where the stipulation envisioned, among other things, the desegregation of the schools in question by the beginning of the 1965-66 academic year.

2. Whether the court of appeals erred in rejecting a finding of the trial court that desegregation of an all-black school was infeasible by means of "cross-busing of the youngest children (grades one through six)" where such children had historically been bused by the board to perpetuate segregation and for purposes unrelated to desegregation.

Argument

On April 6, 1962, black parents and students (hereinafter, "respondents") filed this lawsuit seeking an end to the dual, racially-segregated school system in Orange County, Florida administered by the petitioner, School Board of Orange County.[1] On November 5, 1963, a Special Freeholders' Bond Election resulted in the approval of a $25,000,000 bond issue to fund the construction of certain specifically designated new schools and the renovation of other school facilities in Orange County, Florida. In May, 1964 respondents sought to enjoin the Board from issuing bonds as authorized, asserting that the construction and renovation of schools planned would simply reinforce and perpetuate the dual, segregated system which had not been altered in any significant respect since filing of the desegregation suit two years earlier.

Respondents withdrew their motion to enjoin issuance of bonds pursuant to a stipulation entered into with the

[1] Formerly called, "the Board of Public Instruction of Orange County."

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Board, also in May, 1964, in exchange for the following concessions: first, complete desegregation of the Orange County system would be accomplished from grades 1-12 by 1967-68 according to a "stair-step" desegregation plan;[2] second, under the plan, students would be assigned to the schools nearest their homes, irrespective of race or color; third, new schools would be located and additions to existing facilities carried out without concern for the effect of such actions upon the race or color of the student bodies of such facilities; and fourth, the construction of two new schools on sites accessible to both black and white students would be lifted from the low priority accorded their construction under the bond issue schedule to high priority, over the construction of facilities accessible only to white students given first priority by the bond issue.

Petitioner alleges that four schools—Hungerford, Maxey, Orange Center and Richmond Heights—were built subsequent to and in reliance upon the 1964 stipulation. In fact, however, Richmond Heights had already been constructed at the time the stipulation was entered into, though it did not open for classes until 1965. Moreover, Hungerford Elementary was actually built in 1958, before the stipulation, and later restructured in 1962 and 1965. Hence, the construction of only Orange Center and Maxey Elementaries can be regarded as having any relation at all to the 1964 stipulation. Nevertheless, the histories of all four schools reveal the following facts: first, each was built to relieve overcrowding at old, all-black facilities; second, significant numbers of white students lived in the areas of the old, all-black schools who were transported to more distant all-white schools; third, if transported students

[2] During the school year 1964-65 grades 1, 2 and 7 were to be desegregated; all grades between 1 and 8 were to be desegregated by the 1965-66 school year.

had been sent to these new schools subsequent to their construction, significant numbers of white students would have been enrolled; fourth, no white students attended any of these schools until September, 1970 subsequent to the order of the Fifth Circuit Court of Appeals finding that the Orange County System was still dual with respect to student assignment, *Ellis* v. *Board of Public Instruction of Orange County*, Florida, 423 F.2d 203 (5th Cir., 1970); fifth, by May, 1971, after years of racial assignments by petitioner of white students away from the four schools in question to more distant all-white schools, the number of white students living near Hungerford, Maxey, Orange Center and Richmond Heights had decreased substantially from that present at the time of their construction.

The issue in this case is simpler than the Board would have this Court believe: namely, can petitioner absolve itself from its obligation to desegregate Orange Center and Richmond Heights Elementaries[2] in 1973 based upon a stipulation which, among other things, envisioned the implementation by petitioner of a desegregation plan that would have eradicated the dual system by the 1965-66 academic year, eight years ago? (see N.2, *supra*). Contrary to the Board's assertions, respondents did not stipulate to the construction of Richmond Heights on its present site, since it was built before the stipulation was entered into; respondents did not agree to the construction of Orange Center on its present site with the expectation that it would be all-black, since significant numbers of white students resided near the school. Instead, respondents agreed to the construction of Orange Center based upon petitioner's representation that students would be assigned to schools

[2] Hungerford and Maxey Elementaries were held to be desegregated by the Fifth Circuit, a holding with which respondents did not agree but which they decided not to challenge.

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"without regard to race or color" leading inevitably to the assignment of white students to Orange Center, and for that matter, to Hungerford, Richmond Heights and Maxey.

Petitioner also finds fault with that portion of the Fifth Circuit order requiring desegregation of Eccleston Elementary School. In so holding, that court rejected a finding by the trial court that such desegregation was infeasible since it "would require cross-busing of the youngest school children (grades one through six)". The appellate court's ruling is eminently sound, warranting no review by this Court. Though *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 30 (1971) does suggest that such matters as age of the children and distances may be considered by trial courts in determining the feasibility of desegregation plans requiring busing, it does not stand for the proposition that, as a matter of law, younger children may not be bused; compelling evidence must be presented to the trial court which demonstrates that a proposed busing plan will cause severe hardship to younger children. Despite the requirement of *Swann, supra* (and, in fact, for that matter, of the Federal Rules of Civil Procedure) that the trial court determine the feasibility of a plan based upon evidence, petitioner presented no evidence to establish that cross-busing to desegregate Eccleston would have harmful effects upon young children; quite to the contrary, respondents presented evidence to establish that cross-busing would involve trips to between 3.6 and 4.6 miles and between 11 to 14 minutes travel time—statistics well within those relating to transportation of younger children carried out by the Board in the past for purposes unrelated to desegregation. The trial court's finding of fact was then, in effect, no finding at all but rather, viewed in its best light, mere surmise or conjecture by that court. Certainly

mere incantation of the reference in *Swann, supra*, to "the age of the students" [4] cannot, absent a record, justify a court's finding a desegregation proposal infeasible as was done here. That petitioner disagrees with the Fifth Circuit's refusal to affirm the trial court's finding on Eccleston based upon a bare record should be of no concern to this Court. The Fifth Circuit merely followed the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[4] "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the education process. . . . It hardly needs stating that the limits on time of travel will vary with many factors but probably with none more than the age of the students." *Swann, supra* at 30-31.

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